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STERILIZATION OF CONVICTS AS BEING A CONSTITUTIONAL PUNISHMENT.

The theory of punishment for crime is that it is to deter other commission of crime. When it amounts to deprivation of life, this is upon the principle that infraction of law has been so grievous that there is a forfeiture of the right to live, and the declared policy of the state to take advantage of it. That same policy declares that other violations may incur a forfeiture of liberty during an entire life or a part thereof, or there may be a forfeiture of property.

In other times, but rarely now, we believe, there was entailed restraint of liberty sufficiently long for the infliction of corporal punishment or the exposure of malefactors to public humiliation and disgrace. These punishments were exemplified by the whipping-post and the stocks. Then again there was the branding on the forehead or other part of the body the ineffaceable sign of conviction of certain offenses. This last, however, has for a long time been deemed barbarous.

Our American constitutions came along and generally forbade cruel and unusual punishment for crime, and we take it that such a prohibition would not be limited merely to what would be deemed "cruel and unusual" at the dates respectively of these constitutions. It rather should be thought to be a guarantee to accommodate itself to future times, and thus its spirit be properly recognized.

Thus, though life imprisonment or for a term of years might, at the time a constitution was adopted, appear to justify that such imprisonment should be solitary and without any sanitary benefits, yet within the life of that constitution this might seem so abhorrent to the general sentiment of civilization as to make such a punishment "cruel and unusual." This is merely to suppose that the constitution meant that

these words have a relative meaning according to surrounding circumstances. When the circumstances change, the relative meaning should conform to the change.

But does this method of reasoning embrace, or lead to, the inference, that asexualization of criminals after conviction is justifiable under the kind of guaranty we have spoken of? The guaranty is plainly in the interest of the victim of justice. It is an exertion of humane power in his behalf. It leaves out of consideration the general effect of punishment as a deterrent. It seems to trench upon the state's police power.

If it does the last, we are carried back to inquire whether punishment represents anything more than the state exercising power over what the criminal convict has forfeited to it. The law, as we have known it, has never adjudged, that there might be lopped off from the human body a leg or an arm or even a finger. It has confined itself to deprivation of life, liberty and property, except as we have above indicated.

In the excepted things, too, except, possibly, the branding, there has never been intended anything in the way of a reflex influence than that from punishment on the sufferer thereof. When he shall have paid the penalty, again he is free.

It may be said this is not true, so far as certain statutory rights are concerned, such as voting, for example. But this is not a real exception, because it does not concern one of the inalienable or more sacred rights. The law that gives it may take it away.

Coming back, then, to the right to liberty, when the law's penalty has been satisfied, and finding, that this has always supposed the unmutated citizen, then how stands in constitutional aspect the being asexualized by force of statute?

The Supreme Court of Washington has recently held, that a statute which provides that: "Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years,

or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation," was constitutional under the Washington constitution which merely forbade the infliction of "cruel punishment." *State v. Feilen*, 126 Pac. 75.

We leave out of this discussion the very reprehensible, as it seems to us, feature of the statute, which submits to a judge's discretion the imposing or not of this additional punishment. A legislature ought to declare a fixed policy as to such a thing and not let it depend upon the particular slant of a judge's mind.

But, taking the question by and large, was this a constitutional punishment? We do not think that omitting the words "or unusual" distinguishes the Washington constitution from others. A punishment is "cruel," not because it may be torture, for what may be torture to one may not be more than seriously inconvenient to another and, yet, punishment must be uniform, or generally so. But it is cruel, though it may not be torture, if it is against the canons of what is appropriate or not in accordance with standards that should be observed.

This view the Washington court does not subscribe to. It speaks of the comparative painlessness of the operation of vasectomy, when carefully and skillfully performed, and especially of its being not objectionable in a case, where for the crime of which the defendant stood convicted, the legislature might have prescribed the death penalty.

The argument seems specious, particularly in the case to which it was applied, as life imprisonment had been imposed. In other words, the legislature had done all it could but forfeit the man's life and then the court, in its discretion, takes away a part of his body.

One is somewhat handicapped in arguing the legal question involved in this kind of a case—in such a setting as is presented.

If ever there could be justification for such a law it is in applying it to brutes guilty of rape. But the law itself was not framed on the theory of making these afterwards no longer menaces in their persons to society, as is evident from their being joined with habitual criminals. Further, the purpose is to prevent "procreation."

The statute, therefore, supposes that descendants of these criminals may be objectionable—that congenital traits may appear in offspring. To us this argument has never appealed. It partakes of the spirit which would destroy offspring as relentlessly as mothers were said to cast babes into the Ganges, and we sometimes wonder, whether those who urge these things might not better have been disposed of in this way than those of whom they would make victims.

The unfit to contract marriage have come into speculative consideration, and as opposed to its conclusions we think of the nations of hardy people pushing civilization to the fore and carrying triumphant banners to the uttermost confines of the earth, without ever knowing of such theories, much less resorting to the practices they recommend.

But the question recurs, whether, if to prevent procreation is the only purpose of such a statute, a criminal more than another may become subject to its operation. It presents a theory of forfeiture for crime which may be claimed to be cruel and unusual, merely because it mutilates. Anaesthesia has nothing to do with the case.

NOTES OF IMPORTANT DECISIONS.

POST OFFICE—NEWSPAPER REPORTS OF CRIMINAL TRIALS AS INDECENT LITERATURE.—The Federal District Court for the Eastern District of Virginia lately sustained a motion to quash an indictment against a newspaper for violation of the postal laws in mailing reports of the celebrated Beattie trial. *United States v. Journal Co.*, 197 Fed. 415.

The court thought the language of the publication did not have a tendency to deprave and corrupt morals, but that it should rather have a very contrary effect, "especially when considered in the light of the sad and frightful consequences of the departure from the paths of virtue that befell those whose shortcomings were the subject of investigation."

The court then proceeds and says the postal laws as applied to a newspaper are not in derogation of its constitutional rights and privileges. But a large part of the opinion distinguishes newspapers from other matter in the mails. As to them it is said: "Only clear and palpable infractions of the statute should be noticed, since in the nature of things a large discretion must exist in the publisher, who generally acts through others, and most frequently under great stress in the matter of time, and it should not be lightly assumed either that a court would allow undue publicity to be given to what occurred of the character in question in its presence, or that reputable newspapers would purposely wish to publish and distribute through the mails what would be destructive of social order." Then the freedom of the press is spoken of as being guaranteed.

This kind of argument seems to us to have little foundation to rest upon. If one person really sends objectionable matter through the mails, his offense is like that of another, and thus we understand the court when it rules that the publisher of a newspaper may be held guilty, as another may also be held. If a publisher has to use more circumspection to keep from violating the statute, that is something with which a statute may have some concern, but not a court, unless the statute so directs.

NEWS ITEMS FROM THE LEGAL WORLD OF CONTINENTAL EUROPE.

The Airship in Court. It was in August, 1908, that Count Z. sent one of his dirigibles from Mainz to Friederickshafen. Some motor trouble happened, and the ship was landed in a field. Thousands of people rushed to the place so ropes were run around it, and soldiers were ordered on guard. The ship was anchored, and in addition held by forty men with ropes at the stem, and by thirty at the stern. In the afternoon a sudden thunderstorm came up, struck the dirigible, tore it loose and sent it adrift for about a mile, when it caught fire and was destroyed.

Spectators had been around all the time, and were standing outside the ropes in rows sever-

al deep. Some unfortunate person standing in the outer row near the rear gondola, was caught by the ship's anchor, dragged into the air and carried for some distance; in the fall, one of his legs sustained such injuries that it had to be amputated.

He brought suit for damages, and was nonsuited; appealed; same result. Finally, he appealed to the Reichsgericht. It refused to interfere, for the following reasons: There being no special law governing damage by air navigation, it becomes necessary to prove negligence on the part of the aviator or promoter. The idea that the mere undertaking of a business, acknowledged to be dangerous, carries with it responsibility for all damage caused thereby, is not law. The only duty which the hazardousness of the undertaking imposes upon the person engaged therein, is that of extra care. Otherwise, almost all kinds of transportation would be impossible.

In this case, the trip had commenced during exceptionally fine weather, which continued until after the time when the ship had been landed and anchored. Defendant had proved, that on former occasions he had succeeded in landing, anchoring and holding his ship, even when the weather was unfavorable, and that the means he on such occasions had employed in keeping the ship at its moorings, were not any stronger than those employed on this occasion; in fact, they were weaker. It could not be demanded of the defendant that he should anticipate and provide against such an extraordinary violent gust of wind, as tore his airship away. (VI. 86/11, Jan. 11, 1912).

The 31st German "Juristentag" (Bar Association Meeting) was held in Vienna from September 3 to September 7, 1912. The program contained thirteen questions for discussion. A number of these refer to specific German and Austrian matters, but others are of more general interest, f. inst. No. 4: How can it by law be prevented that the mortgage creditor whose mortgage was not covered by the bid at the sheriff's sale, but who bid in the property, and afterwards through sale thereof obtained payment in full, still can sue the mortgagor on his personal obligation for the amount not covered by the bid at the sale? No. 5: What principles ought to govern in cases of damage caused by electric currents and by airships? No. 10: General discussion of the death penalty. No. 11: The best way to educate lawyers in questions of psychology, sociology and business.

Among the "sideshows" connected with the meeting may be mentioned, an exhibition in the Imperial Library, of ancient and old law-books, manuscripts and other sources of law; also visits to the several courts for the purpose of learning how the Austrian Civil Procedure Act works in practice.

Agreements Between Bidders.—In "Nordisk Tidsskrift," Nos. 1 and 2, 1912, P. Casse of the Copenhagen Bar (he died before the publication) has written a very full, interesting and instructive article, upon the question of the effect of agreements between bidders for work to be undertaken, where bids are asked or advertised for. So-called licitations or submissions [soumissions] in French.

After giving a short historical sketch of the development of this peculiar form of contracting, from the time of Colbert down to date, in French, German, English and Danish law, the author tries to formulate the rules governing such contracts.

The occasion for the article was a decision by the Danish Supreme Court of October 11, 1910, the facts and circumstances of which were as follows: An organization formed for the purpose of erecting hospitals for tuberculosis patients, called for bids for certain buildings. Thirty such were received. The lowest was from a local builder, but as he could not furnish satisfactory security, his bid was rejected, and the work was given to the next lowest bidder. While the work was going on the officers of the organization learned that a day or two before the bids were to be given in, all of the other twenty-nine had held a meeting where they had disclosed to each other the amounts of their contemplated bids, and had reached the agreement, that one of them (plaintiff) should send in his bid unaltered, while each of the others should add Kr. 17,000 to his contemplated bid. It was further agreed that when the work was completed and the price paid, the contractor should pay over Kr. 17,000 for equal division among the other twenty-eight bidders. The plan was carried out, but the hospital committee, having learned of this agreement, refused to pay the contractor the last Kr. 17,000 of the contract price. The County Court gave judgment for plaintiff for the reasons, that the defendant was not bound to accept any of the bids, but could have rejected them all; having accepted one of them, they had no legal interest in, how the contractor used the money received. The Supreme Court ordered judgment to be entered for defendants, stating that by the agreement

the purpose of public bidding had been nullified, and that by keeping the agreement secret, the contractor had misled the defendant; if the agreement had been disclosed, the defendants would have insisted on a reduction in the price of Kr. 17,000.

The article is too long and too full of details to abstract. One of its main points of interest lies in the fact that it sets forth very clearly the differences between an American trust and a German Kartel, and gives an exhaustive analysis of the many various kinds of the latter.

Stopping of Payment. On February 22, 1909, Baron von H. gave R. a check for M. 30,000 on the bank M. On the same day, while the offices of the bank were still open, but after settlement by the paying teller, R. presented the check for payment. The teller stated that the check was good, but that he did not now have enough money in his drawer to pay it. R. stated that it would be satisfactory to him, if the bank would give him its own check on a bank in B. city, where he intended to go and use the money the next day. This was done, and in that day's mail the bank M. sent its letter of advice to the B. bank.

Just as this letter had been mailed, relatives of the baron appeared at the bank M. and notified it that the baron had committed suicide on that very day, and asked that payment on the M. 30,000 check be stopped.

The next morning the bank M. telephoned the B. bank stopping payment on its own check.

The "Reichsgericht" held that the baron's check had been paid, before notice of his suicide had come to the bank M. The later receipt of such notice could in no way affect the bank's obligation to pay its own check. (I. 187/11. Mch. 27, 1912).

AXEL TEISEN.

Philadelphia, Pa.

THE DOCTRINES OF LOCUS POENITENTIAE AND PAR DELICTUM IN THEIR APPLICATION TO ILLEGALITY OF CONTRACT.

The failure of the courts and text-writers in some cases to properly distinguish between the two doctrines above mentioned in their application to illegal contracts is producing confusion in the law. Although they have different fields for operation there is a growing tendency to confine both to one and the same field.

The first (*locus poenitentiae*) has its field for operation in its application to unexecuted ille-

gal contracts, while the latter (*par delictum*) should be confined to executed illegal contracts, and it is something of an anomaly in the law that this distinction should so often be overlooked.

In many decisions we find the court holding that where an illegal contract has not been executed *and the parties are not in equal wrong*, there exists a *locus poenitentiae* in favor of him who is less in fault to avoid the contract and to recover what he may have paid thereunder.

And, again, we find in both the decisions of the courts, and in text-books, the unqualified statement that where an illegal contract is fully executed the court cannot aid either party.

In the first class of cases above mentioned, viz., unexecuted illegal contracts, the question of *par delictum* should have nothing to do with the subject; the only inquiries for the court are, is the contract still unexecuted, and, is the action brought one that is in disaffirmance of the illegal contract.

The law favors the abandonment of illegal executory contracts; it does not do so out of consideration for the guilty party or parties, but in furtherance of public policy, and so long as the illegal contract remains unexecuted, either party thereto, whether in less, equal or greater wrong, should be allowed to avail himself of the *locus poenitentiae*, rescind the contract and have the *status quo* restored by recovering what he had paid out under the contract; not because he is entitled to any favor at the hands of the court, or the law, but because it is better for society that illegal contracts should be abandoned than performed; and by permitting a recovery of what has been paid thereunder, the inducement to the performance of the contract is taken away.

This view is more nearly brought out in the case of *Spring Company v. Knowlton*, 103 U. S. 49, than in any other case that has come under my notice, where the case of *Thomas v. The City of Richmond*, 12 Wall., 349, is cited, in which it is said. "That a recovery can be had as for money had and received when the illegality consists in the contract itself and the contract is not executed; in such a case there is a *locus poenitentiae*; the *delictum* is incomplete; the contract may be rescinded by either party;" and in the case first mentioned, the court proceeds to say: "The rule is applied in the great majority of cases, even when the parties to the illegal contract are in *pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial."

Neither the degree of guilt of the repentant party, nor the nature or degree of the illegality of the unexecuted contract should be the determining factor in any case, but relief should rest on the ground that the contract is unexecuted (or not so far executed as to practically effectuate the illegal object of the contract) and the action must be of such nature as that it is in disaffirmance of the illegal contract.

If the illegal contract has been fully performed, then, of course, there is no place for repentance; the wrong has been accomplished and repentance comes too late to subserve any purpose of the law. It is then purely a question of legal or equitable right; the maxims in *pari delicto potior est defendentis*, and in *pari delicto potior est possidentis* apply and the plaintiff seeking relief from the executed illegal contract can only invoke and receive the assistance of the court as against the defendant, or the possession of the defendant, by showing the absence of *par delictum*, as, for instance, duress, fraud, undue influence, mistake, etc., in which cases if the absence of *par delictum* is clearly and satisfactorily established the courts grant relief, not on the ground of public policy, but as matter of right.

In some jurisdictions in order to the rescission of an unexecuted illegal contract and the restoration of the status quo resort to a court of equity is necessary, but it would seem that, as a general thing, the action at law in disaffirmance of the contract to recover what had been paid, or parted with, under the contract would be adequate.

In text-books and decisions the *locus poenitentiae* in cases of unexecuted illegal contracts is only recognized when the contract is merely *malum prohibitum*, and is denied where the contract is *malum in se*.

May it not well be questioned whether this distinction has any reasonable ground for its support when it must be conceded that the recognition of the *locus poenitentiae* is not based in any case, nor to any extent, on consideration for the wrongdoer, but is indulged by reason of a public policy which favors the abandonment of an illegal contract and the taking away of the inducement to its performance.

That public policy would be subverted even to a greater degree by the abandonment of a contract *malum in se* than of one merely *malum prohibitum* would seem to be obvious, since in most cases the consequences to society following the execution of a contract *malum in se* would be more injurious than the performance of a contract *malum prohibitum*. The distinction is also less apparent because

in suing to recover back what has been paid under the unexecuted *malum prohibitum* contract the person exercising the *locus poenitentiae* does not proceed at all upon the contract itself but in general assumption, upon a *quasi* contract, and therefore in repudiation of the illegal contract, and, if the action were allowed, he would proceed in the same way to recover what he might have paid under an unexecuted *malum in se* contract.

WM. S. THORINGTON.

Montgomery, Ala.

TAKING THE LID OFF OF THE POLICE POWER.

The great principle now "infusing itself into the law," as Prof. Pound, of Harvard, puts it, to-wit, the paramount importance of the idea of social justice as distinguished from individual justice is having the effect of setting indefinite and even infinite limits to the police power of the state when ostensibly exercised in the interest of the whole people.

The suggestion that a state could tax all the banks of a state to provide a fund to guaranty the integrity of every other bank and banker in the state or that the state could charge an employer with liability for accidents not the result of his own wrongdoing, would have been ridiculed by constitutional lawyers, twenty-five years ago, and yet so fast has the leaven of the idea of "social justice" been working that to-day the adherence of the New York Court of Appeals to the old idea of individual justice in its decision in Workmen's Compensation Act Case, has brought universal condemnation upon it.

Another decision which falls in line with this new idea of justice is that handed down by the United States Circuit Court of Appeals (8th Cir.), in the case of Missouri Pacific Ry. Co. v. Omaha, 197 Fed. Rep. 516, in which it is held (over the dissent of Justice Sanborn), that a steam railroad may be compelled by statute to build a viaduct over its tracks at its own expense

to be of such material and strength as to be used not only for ordinary street purposes, but by a street railroad company as well, without requiring the street railroad company to contribute to the cost.

The court admits that there is gross injustice done to the individual (the railroad company) but that under the police power as now conceived, the state may do apparent injustice to the individual in order to guarantee the health, safety or general welfare of the community itself. The fact that in this case a private corporation shares the benefit of the viaduct which the railroad company is required to construct is termed merely "incidental."

That part of the opinion of the court dealing with the general idea of social justice which validates all such legislation is interesting. The court says:

"It may be conceded that if the case before us were not one of the exercise of the police power of the state through the medium of a city, but were to be determined according to equitable principles, we would think the street railroad company should be required to contribute to the cost of the viaduct, and perhaps the city itself, as the representative of other interests. But whether the power of the state is competently exercised or its exercise violates the Constitution of the United States is not to be determined by a court solely by its own sense of right and wrong. Legislation under the police power is naturally along general lines, and it is rare that immediate and exact justice is done to all who may be affected by it. The books are full of cases, which we are constrained to follow, of equal if not greater hardship in which special loss is uncompensated save by participation in the common public good. (See citations in *Railway v. Drainage Comm'rs*, 200 U. S. 561, 26 Sup. Ct., 341, 50 L. Ed., 596, 4 Ann. Cas., 1175). It must be admitted that the danger at crossings of steam railroads and public highways is largely due to the character of locomotive engines and railroad cars and the necessary methods of their

operation, and it is not an unconstitutional exercise of the police power to impose upon the party chiefly responsible for the danger, the duty and cost of removing it (N. Y., etc., *R. R. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Grand Trunk Ry. v. Indiana Railroad Commission*, 221 U. S., 400, 31 Sup. Ct. 537, 55 L. Ed. 786)."

The distinctive feature of the new conception of social justice is that culpability on the part of the individual is not necessary to make him liable for injuries sustained by persons in his employ or by the community by reason of the ordinary and proper conduct of the business. The idea is that where a business, even by the most careful management is, nevertheless, dangerous, that business must bear the whole burden of the damage caused by its operation, and not the community itself, nor the employees engaged in carrying it on. So also in its preventive aspect the new idea of social justice requires that it shall not be regarded as unconstitutional to throw the entire burden of removing the danger incidental to the ordinary operation of a business on the owner of that business.

This new idea of social justice is playing havoc with the old principle of the sanctity of individual liberty and rights in property. All such rights are, under this modern conception of justice, held in strict subservience to the superior rights of the whole community. And since, under Justice Holmes' decision in the *Bank Guaranty* case, the validity of the exercise of the police power in a given case is to be determined by the inquiry whether it represents the prevailing opinion in the community as to the necessity for such legislation, it seems that we are justified in the "scare-head" announcement that we made at the heading of this article, that the lid has been taken off the police power and everything that the community wants, they can have by simply alleging its necessity under the police power.

As the dawn of the new day of "social justice" is flooding the east with its splen-

dor, the night of everlasting doom is fast settling down on the long and eventful era of the supremacy of the individual unit in society.

A. H. R.

THE "RECALL" AS A DISCARDED POLITICAL CONTRIVANCE.

There ought to be some protection in law for the guileless voter who is a victim of fraudulent representations on the part of those political leaders who persist at intervals in "saving" the country. Complaint has been made to the writer that the recall, warranted perfectly new and up-to-date as a panacea, is really a thing outworn. From my examination of the venerable chronicles of our country's respectable past, I am inclined to believe the charge is true. The question is: "Has the voter who has been bamboozled by politicians into thinking the recall is of recent vintage a cause of action for damages for breach of warranty?"

Article V of the Articles of Confederation, in force for ten years prior to our present constitution, contained the recall in all its pristine vigor. This article was as follows:

"For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year, *with a power reserved to each state to recall its delegates*, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year."

Congressmen had judicial functions in those halcyon days so this article really provided for the recall of judges. Article IX of the same historic instrument constituted congress a court in certain cases by the following direct and self-executing section:

"The United States in Congress assembled shall also be the last resort on appeal

in all disputes and differences now subsisting or that may hereafter arise between two or more states concerning boundaries, jurisdiction or any other cause whatever."

The Articles of Confederation were the fruit of mature deliberation. The convention begun the work June 12, 1776, and the first signatures to the completed document were affixed July 9, 1778. So we may safely conclude that the happy invention of the recall was not a matter of thoughtless haste. Ten years later, when our present constitution was under discussion, the recall was incorporated as a part of the proposed fundamental law of the nation. (See report of Constitution Convention, May 29, June 12th and August 14th, in Madison papers). But before the document was finished and signed, it was decided that men of ability might not consent to be merely messenger boys for a fickle constituency, and the recall was laid on the shelf. Mr. Randolph, of Virginia, who had proposed the recall, made no objection when it was finally stricken out. Roger Sherman, Robert Morris, John Dickson and Daniel Carroll, all of whom were for the recall, when they were delegates to draw up the Articles of Confederation, were against it in the constitutional convention. Possibly their ten years' experience with it had operated to alter their convictions.

Proposals to amend the constitution drawn up by the convention at Philadelphia so as to include the recall were quite generally debated by the various states when they held conventions to ratify the constitution. In the State of New York, G. Livingston proposed as an amendment that the recall form a part of the national constitution. Alexander Hamilton, speaking in the New York convention, for the adoption of the constitution as it was originally drawn, shed a great light on the recall when he said:

"The gentlemen, to support their amendment, have observed that the power of the recall, under the old government, has never been exercised. There is no reasoning from this. The experience of a few years un-

der peculiar circumstances, can afford no probable security that it never will be carried into execution with unhappy effects. A seat in Congress has been less an object of ambition, and the arts of intrigue, consequently, have been less practiced. Indeed, it has been difficult to find men who were willing to suffer the mortification to which so feeble a government and so dependent a station exposed them." (From speech of Hamilton before N. Y. Const. Convention, June 24, 1788, against amendment proposing the recall).

The various state conventions insisted on ten amendments being made to the constitution, but the recall was not among them. Possibly we would now be a freer and a more puissant nation had "the fathers" discarded the right of trial by jury and adopted the recall. Who can say?

Recurring again to the injury and damage of the credulous voter who has believed all along that the recall springs from the brain of the same modern school of inventors that nurtured Marconi and the Wright brothers, I ask, does the maxim "Let the buyer beware," control in these transactions, as in vulgar matters of trade? If it be true that there is no injury without an appropriate remedy, it certainly must follow that the voter has an action against the advocates of the recall for false pretenses.

J. W. KELLEY.

Denver, Colo.

INNKEEPERS—GUESTS.

PETTIT v. THOMAS.

Supreme Court of Arkansas, May 27, 1912.

148 S. W. 501.

As regards an innkeeper's liability for baggage, one staying with him is a guest, and not a mere boarder, where no definite time of stay is agreed on, though there is an agreement for a rate by the week.

(Note:—The testimony is rather voluminous and as its effect is set out in the opinion, it is not reproduced. Appellee was at the hotel two weeks when the fire occurred.)

Appellee sued appellant, the proprietor of the Waverly Hotel, at Hot Springs, for the

value of her baggage, wearing apparel, money, and jewelry, destroyed by fire when the hotel was burned, alleging that he was an innkeeper, and that she was a guest at the time of the destruction of the property. Appellant denied that he was an innkeeper and that he received appellee as a guest at the inn, alleged that he was the proprietor of a family boarding house, where visitors to the city of Hot Springs for the benefit of the waters were entertained, and that she was a boarder at the hotel at the time of the destruction of the building and her personal effects by fire, denied that the fire was caused by any negligence or carelessness of himself or his servants, and that appellee lost the articles alleged. * * * *

The court instructed the jury, giving, over appellant's objections, instructions numbered 1, 2, and 3, as follows:

No. 1: "You are instructed that the distinction between a boarder and a guest is made by the contract. A boarder is one who contracts for board and entertainment for a definite period and for a fixed sum. One who stays at a hotel for an indefinite period is not a boarder but a guest."

No. 2: "If you believe from the evidence that the plaintiff resided in Louisville, Ky., and, desiring to come to Hot Springs for her health, arranged to stop at the defendant's hotel at so much per week, and that her proposed stay was for an indefinite period subject to be terminated by the plaintiff at will, and that she was received into the said hotel on these terms and conditions, then you will find that the plaintiff was a guest of the defendant, and was not a boarder."

No. 3: "You are instructed that, if the relation of innkeeper and guest has been established between plaintiff and the defendant, then it was the duty of the defendant, his agents and servants, to use the utmost care and the highest degree of care and diligence to protect the plaintiff against loss by fire, and, if the plaintiff has suffered such loss, then you are instructed that the defendant is prima facie liable for the same, and the burden is on the defendant to establish such facts as will exonerate or relieve him from such burden, and, unless you believe that the defendant has discharged this burden, you will find for the plaintiff."

The jury returned a verdict for appellee in the sum of \$800, and from the judgment appellant brings this appeal.

(1) It is contended by appellant that

he was not an innkeeper, and that appellee was only a boarder at the hotel, and that the court erred in giving its instructions. The common law is in force in this state, and the liability of innkeepers thereunder has not been altered or abridged by our statutes. "An inn has been judicially defined as 'a house where the traveler is furnished with everything which he has occasion for whilst upon his way, * * * but a mere coffee house or eating house or boarding house is not an inn.'" 2 Parsons on Contracts, p. 157. Mr. Bishop says: "An inn, hotel, or tavern is a house for the general entertainment of all travelers and strangers applying, ready to make suitable compensation, and may be or not for the accommodation also of their horses and vehicles." Bishop's Noncontract Law, § 1165. It is defined in 16 Am. & Eng. Enc. of Law, 508, as follows: "An inn is a house which is held out to the public as a place where transient persons who come will be received and entertained as guests for compensation. An innkeeper is one who holds out that he will receive all travelers and sojourners who are willing to pay the price adequate to the sort of accommodation provided."

Appellant, according to his statement, was proprietor of the Waverly Hotel, and, although his principal patrons were families, he received all the transient people he could get, was ready to entertain transient persons whenever they came, and to receive anybody who was a proper person, just like any other hotel, and under the circumstances he was an innkeeper within the meaning of the law.

(2) Being an innkeeper, he was, like a common carrier, an insurer of the property of his guest committed to his care, and liable for any loss thereof, not arising from the act of God, the public enemy, or the neglect or fraud of the owner of the property. It has been so held by the weight of authority that an innkeeper was an insurer of the property of his guest from the time of the decision in Calyes' Case, 8 Coke, 63, down to now. Parsons states the rule: "Public policy imposes upon an innkeeper a severe liability. The later and on the whole prevailing authorities make him an insurer of the property committed to his care against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property." 2 Parsons on Contracts, 158. "He is an insurer of the safety of whatever baggage or other things he receives into his inn from his guest, whether in fact negligent in their keeping or not, except against the two overwhelming forces, termed the acts of God, or the public enemy. For example, if they are stolen or burned without

the fault of either the guest or the landlord, the latter must pay for them." Bishop's Non-contract Law, § 1173. See, also, 2 Kent's Commentaries, p. 594; Beale on Innkeepers and Hotels, §§ 185, 189; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Magee v. Pacific Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199; Shultz v. Wall, 134 Pa. 263, 19 Atl. 742, 8 L. R. A. 97, 19 Am. St. Rep. 686; Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1057, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323; Glenn v. Jackson, 93 Ala. 342, 9 South. 259, 12 L. R. A. 382.

(3) Appellant contends that this rule of liability does not apply to the case presented here, because, as he insists, that appellee is shown to have been a boarder at the hotel, and not a guest at the time of the fire and the destruction of the property. "A guest is a transient person who resorts to and is received at an inn for the purpose of obtaining the accommodation which it proposes to afford. * * * But it is essential that a party shall be a transient—that is, that he shall come to the inn for a more or less temporary stay—and, if he is transient, he may become a guest, in a legal sense, notwithstanding an express contract between him and the innkeeper fixing the amount to be paid, for it has been laid down as one of the distinctive features of the relation that a guest is received under an implied contract." 16 Am. & Eng. Enc. of Law, 516. In Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657, the court said: "A traveler who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for his board and entertainment, or by paying for what he has occasion for as his wants are supplied." In Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417, the court held: "If a traveler who puts up at an inn and is received there as a guest makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder." In Neal v. Wilcox, 49 N. C. 146, 67 Am. Dec. 266, the court said: "A transient customer at an inn, although he be not a stranger or traveler, is considered as a guest, a lodger who sojourns at an inn and takes a room there for a specified time and pays for his lodging on a special agreement, as by the month or week, is a boarder." In Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St.

Rep. 198, the court said: " * * * The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding house." In Bostick v. State, 47 Ark. 126, 14 S. W. 476, the court construing the statute, in which appellant was charged with keeping a public tavern without a license, said: "The testimony tends to prove that her house was a public house, intended for the reception and entertainment of all comers, and not a mere boarding house, where the boarder is selected and received into the house upon an express contract for a certain period of time." Thus it appears that the fact that a person has been at a hotel for more than a week, and paid the reduced weekly rate, does not make him a boarder rather than a guest, in the absence of an agreement as to the time that he would remain in the hotel. Neither does the fact that one makes an arrangement to pay a reduced rate per meal, or per day, or per week take away his character as a guest, where there is no agreement as to the time he will remain at the hotel. And the question whether one is a boarder or guest is one of fact, to be determined by the jury under proper instructions from the court. The court told the jury that the distinction between a boarder and a guest is made by contract, that a boarder is one who contracts for board and entertainment for a definite period and for a fixed sum. One who stays at a hotel for an indefinite period is not a boarder, but a guest; and by instruction numbered 2 that if they should find that plaintiff resided in Louisville, Ky., and, desiring to come to Hot Springs for her health, arranged to stop at defendant's hotel at so much per week, and that her proposed stay was for an indefinite period, subject to be terminated by the plaintiff at will, and that she was received into the said hotel on these terms and conditions, they would find she was a guest of the defendant, and not a boarder.

From the authorities already cited, it will be seen that this was a substantially correct declaration of the law, and the testimony, as set out, shows that appellee came to the hotel with the expectation of remaining an indefinite length of time, and, although there was an agreement as to the weekly rate she should pay for entertainment, there was none as to the time of her stay, and she could have departed at any time that suited her whim or convenience, and the jury were warranted in

finding that she was a guest of the hotel, and not a boarder.

It follows that no error was committed in the giving of said instructions, and, notwithstanding the court gave an instruction as to the liability of the hotel keeper, No. 3, which was more favorable to appellant than the law warranted, he cannot complain of that.

The judgment is right, and is affirmed.

NOTE.—Question of One Being Guest or Boarder Generally One of Fact.—The cases which we submit hereinbelow seem to show, that the old idea of innkeepers being insurers for travelers only is not greatly adhered to, in a distinctive way. An inn is a place to which one, traveler resident may go for entertainment and if one goes just as another goes he is a guest or boarder, according to the way he applies or contracts for entertainment, either in the first place or subsequently. But incidental circumstances easily may carry the question to the jury as one of fact. Nevertheless, the circumstances may be so clear in any case as to authorize the court to declare the relationship as a matter of law.

Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198, cited and quoted from in the principal case, shows that what is quoted was *arguendo*, as there were no facts in the case to prove any theory that plaintiff was a boarder. He was a temporary sojourner with no arrangements for reduction in the *per diem* price or as to the time she should stay, she in her mind having the intention of resting a week or two and then proceeding East. There was, however, no sort of understanding between the parties showing any change of status upon which she was received. There was thought here to be no question for the jury.

In a former case before the same court it was held as matter of law that plaintiff and his family were boarders. The opinion said: "They went to the inn to ascertain if it was a place where the health of plaintiff's wife would be benefitted, with the determination to remain there indefinitely, perhaps for a very long time, if such should be the case. But with a view if her health did not improve to leave at any time. It was also shown that plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler and by the month, and they went prepared to stay, if they desired, for a considerable time and enjoy all the gayeties that might take place." *Moore v. Long Beach Development Co.*, 87 Cal. 483, 26 Pac. 92, 22 A. S. R. 265.

A later case, by the same court, than either of the above considers the question as one of fact. A judgment was rendered for the innkeeper upon the theory of there being a reduction of rates by the week and plaintiff getting the benefit thereof. The case was tried by the court without a jury and a finding of fact was: "That plaintiff and her assignor * * * were inmates of said house under special arrangement for board and lodging by the week for a permanent stay, and at the time of the fire had given no intimation to defendant of any intention to de-

part from said house, where they had been for about ten days." It was held by the supreme court that there was no evidence to sustain this finding, as the fact that it was a mere rule of the house to charge a guest there a week, a less rate *per diem* than others, did not change plaintiff from guest to boarder. But even had there been any special arrangement that would not be determinative of the issue whether plaintiff was a guest or boarder, "but would be merely evidence to be considered in determining that issue." *Macee v. Pacific Improvement Co.*, 98 Cal. 678, 33 Pac. 772, 35 Am. St. R. 199.

In *Pullman, etc., Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. R. 325; 6 L. R. A. 809, where the court arrived at the conclusion that a sleeping car company had the responsibility of an innkeeper, which holding is shown by an extended note to the case to be against the weight of authority, a great number of cases are cited on the question of when one is a guest or boarder, making the note quite valuable, citing to show that an arrangement for weekly rates is insufficient to make one a boarder, the cases of *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Hancock v. Rand*, 17 Hun. 279.

The *Lowe* case also attempts to define a guest and rejects the idea that he need be a traveler, but he is anyone who patronizes an inn as such. See *Waling v. Potter*, 35 Conn. 183.

Another case cited says: "A townsman or a neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest entitled to all the privileges of one." *Wintermute v. Clarke*, 58 Sandf. 247.

As the California court said about special arrangements not being conclusive on the question of one being a guest or boarder, so it was said in *Ross v. Mellin*, 36 Minn. 427; this may be so even though both price and length of stay be fixed.

One of the best treatments of the question, whether one is a guest or boarder is found in *Meacham v. Galloway*, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319. It was shown that plaintiff had no particular arrangement with the hotel but was told if he and his family stayed a week the rate would be \$2.00 per day, this rate being given to all persons who stayed a week or longer. They were given rooms on a certain floor among the regular boarders and this by request of plaintiff, and he and his family were held to be boarders. The court appeared to be influenced by the fact that plaintiff and family were not travelers but residents, and wished, as shown by request for particular location, to be regarded as boarders, or, at least, they accepted for the benefit of particular location the minor responsibility of the hotelkeeper to them. There seems nothing in the rate idea, as what was given was the customary rate, but the accommodations were not the same as those furnished to those not boarders.

In *Hancock v. Rand*, 64 N. Y. 1, 46 Am. Rep. 112, a monthly rate was given in a private house

adjoining the hotel, the expectation being to remain from November until the following spring, if everything was satisfactory and General Hancock, an officer in the army, were not ordered to some other point. The general and his family were held to be guests. This case and the Meacham case seem squarely opposed, and, indeed, there seems less in the Meacham case for finding the status of boarder to exist than was in the Hancock case. Meacham got no other than the customary rate; Hancock did, and both had particular locations. Each had the same right to leave when he chose. Of General Hancock it was said: "Really and actually he was but a transient guest, who had the right to come and go whenever he pleased" So could Meacham have done. The Hancock case goes into quite an exhaustive discussion of authority, and the case is extensively annotated in 73 Am. St. Rep., at page 119. C.

CORRESPONDENCE.

REFORM IN PROCEDURE—THE MISSOURI TENTATIVE PRACTICE ACT.

Editor Central Law Journal:

With much interest I read the "Tentative Suggestions for the Proposed Missouri Practice Act" in the No. 9, August 30th, Journal. These "Suggestions" are interesting for in them exist efforts towards real uniformity in practice, something much to be desired, for with uniformity in the practice acts of the various states there would follow a lessening of useless opinions to the profession, which now amount only to cord wood for book space.

As these "Tentative Suggestions" have as yet not been adopted, permit me to offer a few thoughts and criticisms; and first of all I would suggest that the authors of "Tentative Suggestions" and the Missouri lawyers carefully study the Kansas Practice Act. In my judgment the nearer "Tentative Suggestions" approach the Kansas Practice Act, both trial and appellate, the nearer they approach perfection, and the wider the difference the more cumbersome and less effective.

I doubt if there is a more progressive or just practice act in the Union than the Kansas Act, as formerly written and as adopted by Oklahoma.

The Kansas Appellate procedure is perfection combined with simplicity, and well calculated for a spur to good legal literature.

No so-called bill of exceptions has to be prepared and presented to the court. The bill of exceptions is the whole record as made from the filing of the first pleading to the making of the last ruling.

After the motion for a new trial or arrest in judgment has been overruled and exceptions taken, the aggrieved party then and there, in open court gives notice of his intention to appeal, and asks the court to fix the time in which to make and serve a case on the opposite party.

The case, often termed "case made," consists of a complete transcript of all pleadings, motions, rulings, affidavits and exceptions, together with the evidence as taken by the stenog-

rapher, including rulings on the admissions or exclusion of offered evidence, all of which is certified to by the stenographer as true and correct as taken by him during the trial.

This complete record or transcript of the cause, when finished is served on the opposite party for examination to see if correct.

If there are differences the trial judge adjusts them; if none then he certifies the "case as made" as true, complete and correct, as containing all pleadings, motions, affidavits, rulings on demurrers, and motions—the evidence in the trial, together with all rulings and exceptions taken.

To this certified transcript and record the appealing party attaches his assignment or petition in error and the case is ready for filing in the Supreme Court.

Each page is correctly numbered, and the attorney claiming error must point out the same in his Brief—calling specific and direct attention to the page of the record (more correctly termed case) and usually quotes extensively therefrom, so as to make certainty doubly sure. The method is simple.

The Supreme Court, by the Kansas or Oklahoma method has everything before it that transpired in the lower court, so there can be no excuse for the appellate court not to see things, as they transpired, consequently justice can be done. It is to be hoped the Missouri bar will be progressive and start the ball rolling for correct uniformity by adopting the Kansas method.

Now a few criticisms.

In the Tentative plan it is provided that "no appeal be allowed unless the amount involved is Five Hundred Dollars (\$500) or over, unless the trial judge shall certify that the questions involved are of such importance that the questions should be submitted to the appellate court." The above suggestion is bad, for, carried into effect, it is an added complaint or cause for complaint that assists the agitator in stirring up class hatred. The plan discriminated against the poor and in favor of the rich for the poor man's lawsuits are usually for sums less than Five Hundred Dollars. The business man—the man connected with some corporation, or big interests is more liable to be well acquainted with the trial judge than the poor man.

Under the suggested plan the trial judge may commit all kinds of rank and prejudicial error and make reversible rulings if appeals were allowable, yet the litigants must take their medicine.

The safety valve to a fair trial is the right of appeal. It will prevent the "legal boiler" from exploding. It is conducive to equal justice. I have practiced in States under both systems, and my experience is that the "Five Hundred Dollar appeal limitation" as suggested is productive of a spirit of tyranny. Don't tempt the fair judge. And again: The poor man don't like these discriminations. He pays his taxes to the extent of his ability with the same good cheer as does the wealthy. It should not be left to the trial judge to say, "A fair trial has been had." "There is no error in the record."

Harmless error is simply an excuse for a poor judge.

D. C. LEWIS.

St. Johns, Oregon.

BOOK REVIEWS.

JUDSON ON INTERSTATE COMMERCE. SECOND EDITION.

The first edition of this work, which appeared in 1905, evidenced an entry into legal literature attracting not only wide but very discriminating attention on the part of the bar, most probably very satisfactory to its publisher.

Mr. Frederick N. Judson, of the St. Louis Bar, is among the lawyers whose name had already acquired national prestige, and analysis of the Interstate Commerce Act of 1887, in the light of decision by the federal supreme and other courts was felt and shown to be in competent hands.

The following year, however, a supplement to this first edition was issued because of the amendments to that act adopted in 1906.

There has been such expansion in federal regulation since this first edition and its supplement, both through judicial interpretation and important statutory provisions, that the edition, however satisfactory when it appeared, needed to be replaced, so as to declare the present development of that regulation.

The author notes in his preface that in the first edition of this work judicial construction seemed to him rather to curtail the powers of the Interstate Commerce Commission. Now he deems that both by legislation and construction these powers have been greatly enhanced. This change makes the regulations and rulings of this body take on more a judicial aspect than before and their treatment accordingly more for consideration in a work of this character.

The second edition in its principal division considers the constitutional powers of Congress and permissive powers of states in respect of interstate commerce, then, congressional legislation is considered, and finally such other legislation as relates to employees in interstate commerce along with the twenty-eight-hour live stock transportation law, which last division appropriately may be characterized as the humanitarian side of interstate commerce legislation.

Added to these divisions is an appendix containing certain acts of Congress, rules of practice and forms of procedure before the Interstate Commerce Commission, Rules of Practice of the Commerce Court and Report of National Securities Commission.

The advance in legislation and the development in decision in the intervening years of the first and second editions of this work may or not indicate that it should have a successor not remotely in the future, but whether they do or not detracts in no way from its intrinsic value. On the contrary, the thought is emphasized that the work is needed both to measure such advance and understand its relation in our complex system of government. This is a work that enables the lawyer to keep step with the times. Both legislation and judicial construction must proceed greatly like a schoolbook in higher mathematics—they assume, as in theorems, what has been proven.

This edition is in one volume of 800 pages, regular law size, bound in law buckram and

issuing from the publishing house of T. H. Flood & Co., Chicago, 1912.

DIGEST OF OPINIONS OF JUDGE ADVOCATES GENERAL.

This volume was prepared by Capt. Charles Roscoe Howland, Assistant to the Judge Advocate General and under his direction, and published for the information of the Army and Organized Militia of the United States by order of the Secretary of War.

It covers a period from September, 1862, down to 1912, and purports to include a digest of all opinions of Judge Advocates General except such as were disapproved by the Secretary of War.

The book is in a single volume and is printed by Government Printing Office, Washington, 1912.

HUMOR OF THE LAW.

A poor peasant on his deathbed made his will. He called his wife to him and told her of its provisions.

"I have left," he said, "my horse to my parents. Sell it, and hand over to them the money you receive. I leave you my dog; he is valuable, and will serve you faithfully."

The wife promised to obey, and in due time set out to the neighboring market with the horse and the dog.

"How much do you want for your horse?" inquired a farmer.

"I cannot sell the horse alone, but you can have both at a reasonable rate. Give me \$50 for the dog and \$1.25 for the horse."

The farmer laughed, but as the terms were low he willingly accepted them. Then the worthy woman gave to her husband's parents the \$1.25 received for the horse and kept the \$50 for herself.

Curtis Guild, former governor of Massachusetts, was once asked for the funniest story he ever heard. This is the story he told:

"An Irishman and a Jew were discussing the great men who had belonged to each race, and, as may be expected, got into a heated argument. Finally the Irishman said:

"Ikey, listen. For ivery great Jew ye can name ye may pull out one of me whiskers, an' for ivery great Irishman I can name I'll pull one of yours. Is it a go?"

"They consented, and Pat reached over, got hold of a whisker and said, 'Robert Emmet,' and pulled.

"'Moses!' said the Jew, and pulled one of Pat's tenderest.

"'Dan O'Connell,' said Pat, and took another.

"'Abraham,' said Ikey, helping himself again.

"'Patrick Henry,' returned Pat, with a vicious yank.

"'The twelve apostles,' said the Jew, taking a handful of whiskers.

"Pat emitted a roar of pain, grasped the Jew's beard and yelled, 'The Ancient Order of Hibernians!' "—Cosmopolitan Magazine.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Alteration of Instruments**—Burden of Proof.—Alterations in instruments, in the absence of anything suspicious on their face to indicate improper action in making the alterations, are presumed to have been made at or before execution of the instruments, and the burden is on a party assailing the instrument to show an unauthorized alteration.—*City of Cartersville ex rel. Ruggles v. Luscombe*, Mo., 148 S. W. 966.

2. **Attorney and Client**—Services.—General counsel for a trustee under mortgages held not entitled to recover for his services in actions brought without specific authority merely ancillary to another suit not brought for the client's benefit and which proved to be of no benefit to it.—*Trimble v. Guardian Trust Co.*, Mo., 148 S. W. 934.

3. **Bailment**—Liability.—Baillees are not presumed to have become liable as insurers, and hence a special contract fixing their liability should not be extended beyond its obvious scope.—*Commercial Electrical Supply Co. v. Missouri Commission Co.*, Mo., 148 S. W. 995.

4. **Bankruptcy**—Concealment of Assets.—Where the only reasonable conclusion to be drawn from the evidence before a referee is

that a bankrupt has in his possession or under his control money which belongs to his estate and he has destroyed the books which should show the facts, his mere denial is not entitled to weight.—*In re Goodman*, U. S. D. C., 196 Fed. 566.

5. **Chattel Mortgage**.—A chattel mortgage taken by a creditor of a bankrupt from a corporation organized to take over the business of the bankrupt after the latter has made fraudulent transfers of property to the creditor's knowledge held fraudulent and void, although nominally given to secure payment for stock of the corporation issued to and afterwards surrendered by the creditor.—*In re Levine*, U. S. D. C., 196 Fed. 589.

6. **Damages**.—The measure of damages provable against the estate of a bankrupt for breach of a contract for sale to the bankrupt of articles to be produced, is the difference between the contract price and the cost of production.—*Pratt v. Auto Spring Repairer Co.*, C. C. A., 196 Fed. 495.

7. **Pleading**.—In action to enforce lien by landlord, plea by defendant that his purchase of the property from the tenant's assignee was subsequently confirmed by the trustee in bankruptcy of the tenant held insufficient, where landlord's lien was acquired more than four months before the adjudication in bankruptcy.—*Friedman v. Murphy*, Ariz., 124 Pac. 654.

8. **Provable Debts**.—A judgment against a bankrupt for breach of promise of marriage where seduction was also alleged held not to create a debt for willful and malicious injury or for seduction, but one on contract the enforcement of which it was the duty of the court to stay under section 11 of the act.—*In re Warth*, U. S. D. C., 196 Fed. 571.

9. **Banks and Banking**—Burden of Proof.—In a suit against a bank for the wrongful dishonor of his check, a depositor makes out a prima facie case when he shows funds on deposit sufficient to pay the check but for a particular charge to his account; the burden being on the bank to establish the rightfulness of the charge in question.—*Dycus v. Commonwealth Nat. Bank of Dallas*, Tex., 148 S. W. 1127.

10. **Beneficial Association**—Ultra Vires.—The majority of the members of a subordinate division of a benefit association cannot carry the division and its property over to another society against the will of the minority.—*Kayley v. McCourt*, Pa., 83 Atl. 830.

11. **Bills and Notes**—Evidence.—In an action on notes, where fraud and misrepresentations in selling corporate stock in payment was set up, evidence as to the manner in which the stock was sold held admissible.—*Lindsay v. Sonora Gold Min. & Mill Co.*, Mo., 148 S. W. 849.

12. **Joint and Several**.—A note is joint and several when it binds the makers jointly and separately. It is the same as though the parties to it had executed a joint note and each of them had executed a separate note.—*Sharpe v. Baker*, Ind., 99 N. E. 44.

13. **Demand**.—As between the maker and the payee, a note payable on demand is due as soon as it is executed.—*Brophy Grocery Co. v. Wilson*, Mont., 124 Pac. 510.

14. **Brokers**—Commission.—Where one engaged in selling land employs another and agrees to pay him a fixed commission, and the one so

employed finds a purchaser, it is immaterial to the question of his right to commission whether it absorbs the profit of his employer.—*Daniel v. Sheridan, La.*, 59 So. 24.

15.—**Misconduct**.—The rule that a broker violating his trust forfeits his compensation does not apply to mere errors of judgment or omissions not amounting to misconduct or gross disregard of duty.—*Neighbor v. Pacific Realty Ass'n., Utah*, 124 Pac. 523.

16.—**Carriers of Goods**.—Bill of Lading.—A notation, on a bill of lading issued for a car load of fruit, that the vents on the car are to be closed, is not a direction from the shipper to the carrier to close the vents, without proof that the shipper assented to such notation.—*Yesbik v. Macon, D. & S. R. Co., Ga.*, 75 S. E. 207.

17.—**Intrastate Rates**.—A statute prescribing and regulating intrastate freight rates will be presumed valid until the contrary is shown by proof that it will not afford a fair and reasonable return on the value of the property employed in the service.—*Southern Ry. Co. v. Railroad Commission of Alabama, U. S. D. C.*, 196 Fed. 558.

18.—**Limitation of Liability**.—Where there was no evidence that limitation of a carrier's liability was called to the shipper's attention, and there was evidence that neither the shipper's attention nor that of her agent was called to it, the commonlaw liability of the carrier prevailed, and it was not qualified by the limitation in the receipt.—*Wichern v. United States Express Co., N. J.*, 83 Atl. 776.

19.—**Shipper's Order**.—Billing of goods to shipper's order, with draft on consignee attached to bill of lading, held to indicate that the carrier's duty to deliver would not arise until the bill of lading was presented to it.—*Louisville & N. R. Co. v. United States Fidelity & Guaranty Co., Tenn.*, 148 S. W. 671.

20.—**Champerly and Maintenance**.—Vendor's Lien.—Where the holder of a vendor's lien purchased the premises at a chancery sale to enforce the lien against the purchaser in possession, and then conveyed to a third person, such conveyance was valid, though the vendor's purchaser was in possession.—*Singleton v. Jackson, Ala.*, 59 So. 45.

21.—**Charities**.—Suffering Humanity.—A will empowering executors to designate any needy relatives of testator as heirs to a trust fund, the residue "to be given to an institution or institutions for the relief of suffering humanity as may be deemed by" the executors most worthy of it, held to constitute a valid bequest for charitable uses.—*Dunn v. Morse, Me.*, 83 Atl. 795.

22.—**Commerce**.—Employee.—A switchman, engaged in switching in a railroad division yards in the state a car loaded with freight and in transit from the state to another, is engaged in interstate commerce within the Federal Employer's Liability Act.—*Rich v. St. Louis & S. F. R. Co., Mo.*, 148 S. W. 1011.

23.—**Corporations**.—Merger.—When one corporation acquires a majority of the stock of another, it is bound to manage the affairs of the controlled corporation for the benefit of all the stockholders, and not for its own aggrandizement.—*Hunnewell v. New York Cent. & H. R. R. Co., U. S. C. C.*, 196 Fed. 543.

24.—**Stock Purchases**.—A purchaser of stock with notice of an unrecorded mortgage on property conveyed to the corporation from one having no notice is a bona fide purchaser, and succeeds to all the rights of his vendor.—*Roberts v. W. H. Hughes Co., Vt.*, 83 Atl. 807.

25.—**Contracts**.—Architect's Certificate.—A building contract, imposing penalty for each day's delay unless the architect granted extension of time, held to authorize the architect to determine amount of the delay in the completion of the work for which the contractor is liable to the penalty, and his certificate is conclusive in the absence of fraud or mistake.—*Weld v. First Nat. Bank of Englewood, Ill.*, 99 N. E. 72.

26.—**Construction**.—The rule that all doubts and ambiguities in a contract should be determined against the party preparing it is not very important, and should be resorted to only when all other means of construction fail, especially where the other party signed the contract, and caused some changes to be made therein.—*Commercial Electrical Supply Co. v. Missouri Commission Co., Mo.*, 148 S. W. 995.

27.—**Simultaneous Writings**.—Where two papers are executed simultaneously between the same parties in reference to the same subject-matter, they must be regarded as parts of the same transaction, and receive the same construction as if their several provisions were in one instrument.—*Dime Deposit & Discount Bank of Scranton, Pa., v. Westcott, Va.*, 75 S. E. 143.

28.—**Substantial Performance**.—Money due a building contractor cannot be recovered until he shows at least substantial performance and the amount which should be deducted to meet the cost of remedying the defects.—*John R. Carpenter Co. v. Ellsworth, 136 N. Y. Supp.* 108.

29.—**Refusal to Perform**.—Where one party to a contract declares he will not perform, and does not withdraw his declaration before the time arrives, the other need not perform and may bring his action for breach when the time has passed.—*Wayland v. Western Life Indemnity Co., Mo.*, 148 S. W. 626.

30.—**Restraint of Trade**.—A contract between the manufacturer of paper patterns and a merchant, binding the latter to order patterns for a specified price and not to deal in other patterns during the life of the contract, is not void as against public policy.—*Peerless Pattern Co. v. Gauntlett Dry Goods Co., Mich.*, 136 N. W. 1113.

31.—**Criminal Evidence**.—Nonproduction, of.—Where material evidence is accessible to accused and not to the state, and defendant fails to produce it or to account for its nonproduction, the presumption is that it would have incriminated defendant, and this is a proper subject for argument.—*Crump v. State, Okla.*, 124 Pac. 632.

32.—**Criminal Law**.—Abortion.—A woman on whom an abortion has been performed is not an accomplice, so that her evidence requires corroboration to establish sufficient proof of guilt.—*Meno v. State, Md.*, 83 Atl. 759.

33.—**Rape**.—Where prosecutrix testified that defendants charged with rape enticed her to a secluded spot and committed the offense, evidence that they at the same time and place robbed her was admissible.—*People v. Rardin, Ill.*, 99 N. E. 59.

34.—**Damages**.—Measure of.—One sustaining personal injury resulting in loss of time may recover from the wrongdoer compensation

therefor, though his wages continued during the time he was incapacitated.—*St. Louis & S. F. Ry. Co. v. Clifford*, Tex., 148 S. W. 1163.

35.—**Special Damages.**—Special damages for breach of contract are not recoverable, unless notice of the special circumstances is given at or before the time of the making of the contract.—*Chicago, R. I. & P. Ry. Co. v. King*, Ark., 148 S. W. 1035.

36.—**Death.**—Foreign Administrator.—An action for causing death, being a transitory action, may be maintained by a foreign administratrix.—*Midland Valley R. Co. v. Le Moynes*, Ark., 148 S. W. 654.

37.—**Presumption of Care.**—The presumption that decedent, for whose death an action is brought, exercised due care is one of fact and may be rebutted by evidence showing what he did at the time of the infliction of the fatal injury.—*Burge v. Wabash R. Co.*, Mo., 148 S. W. 925.

38.—**Deeds.**—Blank Space.—A deed leaving a blank space for the name of a grantee is a nullity until the name is inserted; but if the grantee, under express or implied authority, inserts his own name, the deed becomes operative, without re-execution or reacknowledgment.—*Board of Education of City of Minneapolis v. Hughes*, Minn., 136 N. W. 1095.

39.—**Interlineation.**—A grantee in a deed containing an interlineation referring to an agreement not in existence at the time is not bound by a subsequent restriction fixing a building line, to which he did not assent.—*Cleverger v. Quinn*, N. J., 83 Atl. 771.

40.—**Intention Delivery.**—Intention of the grantor to pass title is essential to a valid delivery of a deed.—*Piercy v. Piercy*, Cal., 124 Pac. 561.

41.—**Mutual Mistake.**—Equity can relieve against a deed for mutual mistake unaccompanied by fraud, where the subject of the conveyance is so materially variant from what the parties supposed it to be that the substantial object of the conveyance failed.—*Dunn v. Dunn*, 136 N. Y. Supp. 282.

42.—**Divorce.**—Alimony.—Where a defendant concedes his failure to comply with an order of court for payment of alimony to plaintiff, his wife, and no excuse is presented, plaintiff's motion to punish for contempt must be granted.—*Merrifield v. Merrifield*, 136 N. Y. Supp. 87.

43.—**Dower.**—Contingent Interest.—An inchoate dower interest is a valuable but a contingent interest which does not ripen into a use until the death of the husband, nor is it an interest which she may require to be assigned or admeasured.—*Bell v. Golding*, 136 N. Y. Supp. 278.

44.—**Easements.**—Quality of.—Ordinarily an easement is a right in fee, but it may be for an estate less than a fee or for a term of years.—*Goldman v. Beach Front Realty Co.*, N. J., 83 Atl. 777.

45.—**Eminent Domain.**—Additional Public Use.—Property devoted to a public use cannot be set apart for another and inconsistent public use, in the absence of legislation expressly or impliedly warranting it.—*Southern Ry. Co. v. City of Memphis*, Tenn., 148 S. W. 662.

46.—**Riparian Rights.**—The right of a lower millowner to the natural flow of a river is a property right which can be condemned by a private corporation only in the manner required in condemning other property.—*Hubbard v. Limerick Water & Electric Co.*, Me., 83 Atl. 795.

47.—**Estoppel.**—Claimant of.—No one can claim an estoppel by deed who is neither a party nor a privy thereto.—*Tate v. Tate*, Tenn., 148 S. W. 1042.

48.—**Evidence.**—Judicial Notice.—The courts take judicial notice of the necessity for underground excavations in great cities.—*City of St. Louis v. Atlantic Quarry & Construction Co.*, Mo., 148 S. W. 948.

49.—**Replevin.**—The affidavit by plaintiff in replevin is competent evidence against him as to the value of the property, and he will not be heard to object to its competency nor to deny its truthfulness.—*Stiller v. Atchison*, T. & S. F. Ry. Co., Okla., 124 Pac. 595.

50.—**False Pretenses.**—Element of Offense.—In a prosecution for obtaining money from an old man, under false pretenses, held no defense that

a man of ordinary ability would have disbelieved the false representations, or that the victim of the swindle made no attempt to verify them.—*State v. Starr*, Mo., 148 S. W. 862.

51.—**Forgery.**—Grantee in Deed.—A change in the name of a grantee in a deed subsequent to its execution is forgery.—*State ex rel. Hunt v. Grimm*, Mo., 148 S. W. 868.

52.—**Principal.**—Where a person forged a check at the request and in the presence of another, the latter was guilty of forgery.—*Ary v. State*, Ark., 148 S. W. 1032.

53.—**Frauds, Statute of.**—Interest in Land.—A sale of a growing crop of hay with leave to the buyer to enter and remove it is not a sale of an interest in land within the fourth section of the statute of frauds.—*Kreisle v. Wilson*, Tex., 148 S. W. 1132.

54.—**Parol Lease.**—A parol lease of land for more than a year is merely voidable, and not absolutely void, under the statute of frauds.—*Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, Me., 83 Atl. 801.

55.—**Partnership in Land.**—A parol agreement, which creates a partnership for the purchase and sale of real estate for speculation and for the division of the profits among the partners, is valid, notwithstanding the statute of frauds.—*Burgwyn v. Jones*, Va., 75 S. E. 138.

56.—**Garnishment.**—Attachable Effects.—If the officers of a bank knew that an undistributed balance deposited in the name of an assignee for the benefit of creditors belonged to the assignor it was liable for such amount, where it paid it to the assignee after service of a writ of garnishment in an action against the assignor.—*State Nat. Bank v. Wheeler & Motter Mercantile Co.*, Ark., 148 S. W. 1033.

57.—**Savings Banks.**—A savings bank deposit, standing in the name of husband and wife, or the survivor of them, and being owned in equal amounts held subject to garnishment for the husband's debt only to the extent of his interest therein.—*Catlow v. Whipple*, R. I., 83 Atl. 753.

58.—**Guardian and Ward.**—Surrogate's Jurisdiction.—A surrogate cannot compel a guardian to account for money received by him after his ward's death, though it is claimed to be part of the ward's estate.—*In re Wolfe*, 136 N. Y. Supp. 333.

59.—**Habeas Corpus.**—Jurisdiction.—A prisoner may not be discharged from custody by habeas corpus proceedings in a tribunal without power to vacate the order of commitment, or to dispose of the indictment upon which it was issued.—*People ex rel. Burke v. McLaughlin*, 136 N. Y. Supp. 122.

60.—**Remedy.**—In a habeas corpus proceeding, the judgment of commitment can be attacked for want of jurisdiction of the person, over the subject-matter, or want of jurisdiction in the particular case owing to the facts thereof.—*Ex parte Creasy*, Mo., 148 S. W. 914.

61.—**Homicide.**—Killing Bystander.—One who shoots at another with intent to kill him, but who kills a third person, is guilty of murder in the second degree.—*Rainer v. State*, Tex., 148 S. W. 735.

62.—**Homestead.**—Status of Claimant.—Where a widow, whose husband dies intestate while a resident of a foreign state, moves to this state, remarries, is appointed guardian to the minor children of herself and decedent, fraudulently obtains permission of the court of the foreign state to exchange and therein for land in this state, and takes title in her own name to the exclusion of the children, she does not obtain the right to hold the land as homestead against the children.—*Bell v. Dingwell*, Neb., 136 N. W. 1128.

63.—**Husband and Wife.**—Entireties.—A tenant by entirety has no separate interest or property in the entirety estate which can be claimed as exempt; the right of an execution defendant to claim property as exempt extending only to property in which he has an individual interest.—*Sharpe v. Baker*, Ind., 99 N. E. 44.

64.—**Injunction.**—Liability on Bond.—Liability on an injunction bond in the federal courts is not fixed until final decree; the court having power to relax or modify the conditions of the bond or suspend a right of action thereon.—

Southern Ry. Co. v. Railroad Commission of Alabama, U. S. D. C., 196 Fed. 558.

65. **Inkeepers**.—Loss of Goods.—A boarding house keeper is liable for the loss of goods of a boarder only where he has failed to exercise ordinary care to prevent it.—*Mahr v. Vaughan*, 136 N. Y. Supp. 125.

66. **Insurance**.—Disease from Injury.—On policy covering death as the result of accidental injuries, insurer held liable where death was caused by a disease itself caused by such injuries.—*Armstrong v. West Coast Life Ins. Co.*, Utah, 124 Pac. 518.

67. **Estoppel**.—By receiving premiums for the insurance, a fraternal order is estopped to deny its capacity to issue a beneficiary life certificate.—*Kammer v. Supreme Lodge K. P. S. Car.*, 75 S. E. 177.

68. **Fidelity Company**.—Bonds guaranteeing the fidelity of employees construed as contracts of insurance, so that the surety or insurer was not entitled to the favorable consideration accorded to gratuitous sureties.—*Louisville & N. R. Co. v. United States Fidelity & Guaranty Co.*, Tenn., 148 S. W. 671.

69. **Fraternal Society**.—The rule that the law determines whose agent one is from the source of his appointment, and the nature of the duties he is appointed to perform, applies to fraternal beneficiary associations.—*Godwin v. National Council Knights and Ladies of Security*, Mo., 148 S. W. 980.

70. **Fraternal Society**.—Where a fraternal insurance order assesses illegal dues against a member, and includes them with the legal quarterly assessment, the member, to preserve his rights, is bound to tender the amount lawfully due.—*Goldberger v. United States Grand Lodge, Order Brith Abraham*, 136 N. Y. Supp. 13.

71. **Indemnity**.—A life insurance policy is not a contract of indemnity, but is a contract to pay money upon the death of the assured in consideration of certain payments made during his life.—*Wayland v. Western Life Indemnity Co.*, Mo., 148 S. W. 626.

72. **Insurable Interest**.—Whether one has an insurable interest in property is tested by the question whether he will be directly and financially affected by loss of the property.—*Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, Me., 83 Atl. 801.

73. **Tending Assessments**.—The silence of assured and his failure to tender subsequent legal assessment after he failed to pay an illegal assessment and the assessment life insurance company declared his insurance forfeited was not an abandonment of his rights.—*Johnson v. Hartford Life Ins. Co.*, Mo., 148 S. W. 631.

74. **Waiver**.—Indulgence upon a few occasions, on the part of an insurer in extending the time for payment of the premiums, does not operate to waive a forfeiture for the non-payment of a premium at the time specified for payment.—*Citizens' Nat. Life Ins. Co. v. Morris*, Ark., 148 S. W. 1019.

75. **Warranty**.—A life policy is vitiated by a false statement in the application, where the statement constitutes a warranty, whether material or not.—*Goff v. Mutual Life Ins. Co. of New York*, La., 59 So. 28.

76. **Judgment**.—Default.—On an application to open a default judgment, the court will not hear counter affidavits on the merits, or examine into the truth of the allegations of defense.—*Centreville Nat. Bank of Warwick v. Inman*, R. I., 83 Atl. 755.

77. **Judicial Sales**.—Public Policy.—A combination to depress bidding at a judicial sale is against public policy, and the sale may be vacated.—*Shuck v. Missouri Lumber & Mining Co.*, Mo., 148 S. W. 609.

78. **Judgment**.—Res Judicata.—In determining whether a former judgment is res judicata, the test is not the nature of the relief demanded, but is whether the facts put in issue, found, and adjudged are the same sought to be litigated in the later action.—*Tew v. Webster*, Minn., 136 N. W. 1098.

79. **Landlord and Tenant**.—Rescission by Lessee.—Where a landlord, in making repairs, prevents tenant from entering into possession on first day of term, the tenant may rescind the lease and recover advances paid.—*Kopelman v. Gritman*, 136 N. Y. Supp. 296.

80. **Secret Lease**.—If a tenant of an adverse claimant of land take a secret lease from a third person, without the knowledge of his landlord, the character of his possession will not be changed thereby.—*Point Mountain Coal & Lumber Co. v. Holly Lumber Co.*, W. Va., 75 S. E. 197.

81. **Statute of Frauds**.—A lease for one year with the privilege of two years' renewal at a rental satisfactory to both parties is enforceable.—*Anderson v. Frye & Bruhn*, Wash., 124 Pac. 499.

82. **Limitation of Actions**.—Continuing Nuisance.—A property owner held entitled to recover for the pollution of surface water standing on his property, though a recovery for the condition causing the surface water to stand is barred by limitations.—*Gorman v. Chicago, B. & Q. R. Co.*, Mo., 148 S. W. 1009.

83. **Malicious Prosecution**.—Attachment.—Where an attachment was issued and levied maliciously and without probable cause, exemplary damages are recoverable.—*Carroll v. First State Bank of Denison*, Tex., 148 S. W. 818.

84. **Master and Servant**.—Assumption of Risk.—A servant does not assume the increased risk of the master's negligence in failing to warn him of latent dangers known to the master and unknown to him.—*Marion Light & Heating Co. v. Vermillion*, Ind., 99 N. E. 55.

85. **Discharge**.—A cause of action arises immediately upon the wrongful discharge of an employee under contract for a definite time, and it is not necessary to await the termination of that time.—*Harris v. Coconut Grove Development Co.*, Fla., 59 So. 11.

86. **Proximate Cause**.—Where a servant engaged in picking out old ties was injured in consequence of his pick slipping out of a rail, which resulted from the pick being dull, held, that the master was not guilty of negligence; there being nothing to show that he should have anticipated the injury.—*Lowe v. St. Louis & S. F. R. Co.*, Mo., 148 S. W. 956.

87. **Respondent Superior**.—Where a collector was without authority to retake goods sold on the debtor's refusal to pay, the master was not liable for an assault committed by such agent in retaking such goods against the debtor's will.—*Murphy v. Buckley Newhall Co.*, 136 N. Y. Supp. 309.

88. **Vice Principal**.—An employee, charged with the duty of warning other employees of impending danger, is a vice principal, for whose negligence the master is liable.—*Wickstrom v. Whitney*, Minn., 136 N. W. 1099.

89. **Mechanics' Liens**.—Common Law.—At common law, a subcontractor for labor and materials for the construction of a building had no legal claim which he could maintain at law or in equity against the owner.—*N. J. Steigleder & Son v. Allen*, Va., 75 S. E. 191.

90. **Substantial Performance**.—Where a statutory lien may be obtained by compliance with stated requirements, there must be a substantial performance of all the requisites before the lien is acquired.—*Langford v. South Florida Lumber & Supply Co.*, Fla., 59 So. 12.

91. **Money Received**.—Duress.—Where there was evidence that plaintiff, a policeman, had been compelled by duress to turn over the check for his salary to the chief of police, who returned it to the town by which the money was owing, plaintiff could recover the same from the town in an action for money had and received.—*Mee v. Town of Montclair*, N. J., 83 Atl. 764.

92. **Monopolies**.—Practice.—In an action for damages for conspiracy to monopolize interstate trade, under Anti-Trust Act, plaintiff must from the nature of the case be given a liberal latitude in his pleading.—*Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, U. S. D. C., 196 Fed. 514.

93. **Mortgages**.—Conditional Sale.—Rights of sellers under a conditional sale of plumbing, mantels, and mirrors used in the construction of certain houses, after the execution of a mortgage thereon, held superior to the mortgage.—*Astor Mortgage Co. v. Milton Const. Co.*, 136 N. Y. Supp. 82.

94. **Security for Debt**.—A mortgage does not pass the title to the mortgagee but is only a lien upon the property, the title remaining in

the mortgagor, and this is true as to an instrument in form a deed but intended as a mortgage.—*Bailey v. Frazier, Ore.*, 124 Pac. 643.

95. **Municipal Corporations**.—Notice.—Notice to a street commissioner or member of the common council of a city of a defective street or crossing is actual notice to the city.—*City of Hammond v. Jahnke, Ind.*, 99 N. E. 39.

96. **Negligence**.—Attractive Nuisances.—An owner maintaining on his premises near where children live machinery which is usually attractive to them must use care to avoid injury to the children which he impliedly invites to enter on his premises.—*Hogan v. Houston Belt & Terminal Ry. Co., Tex.*, 148 S. W. 1166.

97. **Proximate Cause**.—The proximate and natural consequences of an act of negligence are always deemed foreseen, though the precise injury may not have been anticipated.—*Gulf, C. & S. F. Ry. Co. v. Smith, Tex.*, 148 S. W. 820.

98. **Nuisance**.—Special Injury.—A private person, who suffers a special injury from a public nuisance different in kind from that of the community in general, may maintain an action for abatement of the nuisance, although his injury is such as may be compensated in damages.—*Ort v. Bowden, Tex.*, 148 S. W. 1145.

99. **Officer's Salary**.—Presumption.—There is no presumption of law that an officer is to receive a salary.—*State v. Romero, N. Mex.*, 124 Pac. 649.

100. **Partnership**.—Exemption.—A partner cannot claim an exemption in the partnership property.—*Sharpe v. Baker, Ind.*, 99 N. E. 44.

101. **Facts Constituting**.—Two persons entered into a contract for the purchase of lumber land, each contributing time, labor, and money to carry on the operations, and dividing equally the profits and losses, each acting for the other in the employment and payment of labor and selling their product, each intending to become partners, held partners.—*Edwards v. Zuck, Mich.*, 136 N. W. 1123.

102. **Test of**.—An agreement between T. and M. to conduct a business of dealing in tax titles, T. furnishing the money required, M. managing the business, the title to property purchased being taken in T.'s name, T. receiving out of the profits 10 per cent of his investment, and the remaining profits being equally divided, constituted a partnership.—*Oriental Realty Co. v. Taylor, Wash.*, 124 Pac. 489.

103. **Pawnbrokers**.—Conversion.—Where a pawnbroker was induced to deliver goods pawned to a third person, and the pawnor's wife subsequently obtained judgment against him for conversion, the third person held liable to the pawnbroker for the damages.—*Simpson v. Pilpoul*, 136 N. Y. Supp. 46.

104. **Physicians and Surgeons**.—Emergency.—In case of an emergency a surgeon may operate on a child without waiting for authority from his parent, where on information given him it is impracticable to get it.—*Luka v. Lowrie, Mich.*, 136 N. W. 1106.

105. **Principal and Agent**.—Secret Instructions.—One dealing with an agent clothed with the visible indicia of a general agent is not bound by secret instructions limiting the agency.—*Higbee v. Billick, Mo.*, 148 S. W. 879.

106. **Quieting Title**.—Unoccupied Lands.—Where, in an action to quiet title to vacant and unoccupied lands, plaintiff establishes ownership in fee, he establishes constructive possession sustaining his right to sue, in the absence of actual entry and adverse possession by another.—*Mulqueen v. Lanning, Colo.*, 124 Pac. 577.

107. **Reformation of Instruments**.—Mutual Mistake.—To justify the reformation of a deed on the ground of mistake, the mistake must be a mutual mistake of both parties, and contrary to the intention of both parties.—*Dickey v. Forrester, Tex.*, 148 S. W. 1181.

108. **Removal of Causes**.—Federal Question.—A cause cannot be removed to a federal court simply because in the progress of litigation it may become necessary to construe the Constitution or laws of the United States.—*Shellenbarger v. Fewel, Okla.*, 124 Pac. 617.

109. **Sales**.—Action on Contract.—Where a buyer refused to take baled straw pursuant to his contract, the seller may hold the straw for the seller's benefit and sue for the contract price.—*Dehner v. Miller, Mo.*, 148 S. W. 953.

110. **Breach of Contract**.—A purchaser, who has breached a contract for sale and delivery of lumber by refusing to accept lumber tendered, cannot sue for damages for nonperformance.—*Godchaux v. Chicago Lumber & Coal Co., La.*, 59 So. 33.

111. **Implied Warranty**.—An implied warranty that feed for animals is fit for that purpose will not survive an acceptance by the buyer.—*R. Young Bros. Feed Co. v. Seymour*, 136 N. Y. Supp. 80.

112. **Indivisible Contract**.—Where an indivisible contract of sale did not set time for delivery on refusal of a part delivery; the seller could treat the contract as broken, and sue for the price of that delivered.—*Mound Oil Co. v. F. W. Heitmann Co., Tex.*, 148 S. W. 1187.

113. **Specific Performance**.—Conditions of.—Specific performance of a contract to purchase three lots will not be decreed as to two, where the title to one of the lots is defective.—*Gosman v. Pfister, N. J.*, 83 Atl. 781.

114. **Tenancy in Common**.—Adverse Possession.—The possession by one tenant in common may be adverse where the possessor repudiates the rights of cotenants and shows an intention to hold adversely as to them, though it is not necessary that such acts shall be brought to the notice of the cotenants to create title by adverse possession.—*Allen v. Morris, Mo.*, 148 S. W. 905.

115. **Trade Unions**.—Ultra Vires.—A rule of an incorporated musicians' association that none of its members should accept employment in theaters or opera houses unless a certain proportion were employed was not ultra vires.—*Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass'n, Minn.*, 136 N. W. 1092.

116. **United States**.—Estoppel.—The United States may recover money paid through errors of its disbursing officers whether of fact or law, when it is equitably entitled to the same, and cannot be estopped to maintain an action therefor by any action of its officers.—*United States v. Kerr, U. S. C. C.*, 196 Fed. 503.

117. **Vendor and Purchaser**.—Assumption of Debt.—Where the grantor owed for labor and material for erecting a building, and the grantee assumed the debt, as between them, the grantee thereby became the principal debtor, and the grantor became a surety.—*Paris v. Lawyers' Title Ins. & Trust Co., N. Y.*, 99 N. E. 83.

118. **Rescission**.—Where a purchaser in an executory contract of sale made substantial payments of the price and expressed a willingness to pay the remainder, the vendor, retaining a lien for the unpaid price, could not rescind the contract.—*Jreyer v. Southard, Tex.*, 148 S. W. 1103.

119. **Venue**.—Simulated Transfer.—One's right to be sued on an open account in the county of his domicile cannot be defeated by a simulated transfer of the account for the purpose of conferring jurisdiction in a court of another county.—*Van Horn Trading Co. v. Day, Tex.*, 148 S. W. 1129.

120. **Waters and Water Courses**.—Parties to Action.—A suit to abate a nuisance caused by the pollution of a stream by the operation of mills used in mining, owned and operated independently by several persons acting separately, is properly brought against all.—*State ex rel. Federal Lead Co. v. Dearing, Mo.*, 148 S. W. 618.

121. **Percolations**.—A proprietor of the soil where percolating water is found may control its use as he pleases, to improve his land, though such use may incidentally injure an adjoining proprietor.—*Ryan v. Quinlan, Mont.*, 124 Pac. 512.

122. **Wills**.—Adopted Children.—A devise of a remainder to the heirs at law of the beneficiary for life includes the adopted children of the beneficiary, though there was not when the will was executed any statute for the adoption of children.—*Smith v. Hunter, Ohio*, 99 N. E. 91.

123. **Construction**.—Words in a will which have a definite primary meaning must be understood to be used in such sense, unless an intention to use them in another sense manifestly appears.—*White v. Old, Va.*, 75 S. E. 182.

124. **Undue Influence**.—The burden is on contestants of a will to show that it was executed under undue influence.—*Berry v. Brown, Tex.*, 148 S. W. 1117.